

1
2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 O.B. WILLIAMS COMPANY,

11 Plaintiff,

12 v.

13 S.A. BENDHEIM WEST, INC.,

14 Defendant / Third-
15 Party Plaintiff,

16 v.

17 CARDINAL LG COMPANY, et al.,

18 Third-Party
19 Defendants.

CASE NO. C08-1155JLR

ORDER GRANTING IN PART
BENT GLASS'S MOTION FOR
SUMMARY JUDGMENT

20 This matter comes before the court on Third-Party Defendant Bent Glass Design,
21 Inc.'s ("Bent Glass") motion for summary judgment regarding contribution and
22 attorney's fees (Dkt. # 126). Having considered the submissions of the parties, and for

the reasons set forth below, the court GRANTS in part and DENIES in part Bent Glass's motion for summary judgment (Dkt. # 126).

I. BACKGROUND

As the parties are familiar with the factual background of this case, the court does not repeat it here.¹ The relevant procedural background is as follows. On July 13, 2010, the court entered its Order on Third-Party Defendants Cardinal LG Company and Cardinal Glass Industries, Inc. (collectively, "Cardinal") and Bent Glass's motions for summary judgment against Defendant / Third-Party Plaintiff S.A. Bendheim West, Inc. ("Bendheim"). (July 13, 2010 Order (Dkt. # 123).) In its July 13, 2010 Order, the court granted Bent Glass's motion for summary judgment. (*Id.*) Because Bent Glass had not moved for summary judgment regarding Bendheim's claim for contribution, however, the court denied without prejudice Bent Glass's motion for attorney's fees under Washington's long arm statute. (July 13, 2010 Order at 24 n.6 (discussing contribution); *id.* at 29 (denying attorney's fees because Bent Glass was not a "prevailing party" as required by RCW 4.28.185(5)).) On July 21, 2010, the court denied Bendheim's motion for reconsideration regarding its indemnification claim against Bent Glass. (Dkt. # 125.)

On July 22, 2010, Bent Glass filed the instant motion for summary judgment regarding contribution and attorney's fees. (Dkt. # 126.) On August 23, 2010, Bendheim filed a response in which it did not contest Bent Glass's motion regarding contribution,

¹ For a summary of the facts of this case, see the court's July 13, 2010 Order on Third-Party Defendants' motions for summary judgment (Dkt. # 123).

1 but asked the court to deny or limit Bent Glass's attorney's fees. (Dkt. # 129.) On
2 August 26, 2010, Bent Glass filed a reply. (Dkt. # 130.) On August 27, 2010, Bendheim
3 filed a surreply in which it moved the court to strike portions of Bent Glass's reply and
4 the Declaration of Steven Lerner, President of Bent Glass, filed in support of the reply.
5 (Dkt. # 132.)

6 II. ANALYSIS

7 A. Summary Judgment Standard

8 Summary judgment is appropriate if "the pleadings, the discovery and disclosure
9 materials on file, and any affidavits," when viewed in the light most favorable to the non-
10 moving party, "show that there is no genuine issue as to any material fact and that the
11 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *Celotex*
12 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. County of Los Angeles*, 477 F.3d
13 652, 658 (9th Cir. 2007). The moving party bears the initial burden of showing there is
14 no genuine issue of material fact and that he or she is entitled to prevail as a matter of
15 law. *Celotex*, 477 U.S. at 323. If the moving party meets his or her burden, then the non-
16 moving party "must make a showing sufficient to establish a genuine dispute of material
17 fact regarding the existence of the essential elements of his case that he must prove at
18 trial" in order to withstand summary judgment. *Galen*, 477 F.3d at 658. The non-
19 moving party "must present affirmative evidence to make this showing." *Id.*
20 Furthermore, "[b]ald assertions that genuine issues of material fact exist are insufficient,"
21 and a mere scintilla of evidence supporting a party's position is also inadequate. *Id.*
22

1 **B. Motion to Strike**

2 The court first addresses Bendheim's motion to strike. In its surreply, Bendheim
 3 moves the court to strike (1) those portions of Bent Glass's reply in which it argues that
 4 Bendheim's lawsuit was frivolous or harassing, and (2) Mr. Lerner's declaration (Dkt. #
 5 131) and those portions of Bent Glass's reply in which Bent Glass contends that it is
 6 entitled to its total attorney's fees under Washington's long-arm statute. (Surreply at 1-
 7 3.) The court denies the motion to strike because Bendheim raised the issues of whether
 8 its lawsuit was frivolous or harassing and the scope of Bent Glass's attorney's fees award
 9 in its response. (*See Resp.* at 5-7.)

10 **C. Contribution**

11 Bendheim does not contest Bent Glass's motion for summary judgment regarding
 12 contribution. Having reviewed the relevant authority, the court finds that Bent Glass has
 13 established that it is entitled to judgment as a matter of law on Bendheim's contribution
 14 claim. RCW 4.22.040(1) provides:

15 A right of contribution exists between or among two or more persons who
 16 are jointly and severally liable upon the same indivisible claim for the same
 17 injury, death or harm, whether or not judgment has been recovered against
 all or any of them. . . . The basis for contribution among liable persons is
 the comparative fault of each person

18 RCW 4.22.040(1). "The statutory right of contribution under RCW 4.22.040 is limited to
 19 tort-based claims." *Cent. Wash. Refrigeration, Inc. v. Barbee*, 913 P.2d 836, 840 (Wash.
 20 Ct. App. 1996), *rev'd on other grounds*, 946 P.2d 760 (Wash. 1997). Here, Bendheim's
 21 claims sound in contract rather than in tort. Further, the Washington legislature has
 22 abolished joint and several liability except in three narrow circumstances, none of which

1 apply here. *See* RCW 4.22.070(1). The court therefore grants Bent Glass's motion for
 2 summary judgment regarding contribution.

3 **D. Attorney's Fees**

4 Bent Glass contends that it is entitled to an award of attorney's fees pursuant to
 5 Washington's long-arm statute, which provides:

6 In the event the defendant is personally served outside the state on causes
 7 of action enumerated in this section, and prevails in the action, there may
 8 be taxed and allowed to the defendant as part of the costs of defending the
 9 action a reasonable amount to be fixed by the court as attorneys' fees.

10 RCW 4.28.185(5).

11 The statute authorizes an award of reasonable attorney's fees where the defendant
 12 "prevails in the action." *Id.* The Washington Supreme Court has stated that "a prevailing
 13 defendant should not recover more than an amount necessary to compensate him for the
 14 added litigative burdens resulting from the plaintiff's use of the long-arm statute." *Scott*
 15 *Fetzer Co., Kirby Co. Div. v. Weeks*, 786 P.2d 265, 271 (Wash. 1990). The court
 16 explained this principle as follows:

17 Limiting awards to the increase in fees caused by exercise of long-arm
 18 jurisdiction . . . meaningfully enforces the statutory restriction of awards to
 19 "a reasonable amount." One obvious purpose of the long-arm statute's
 20 fees provision is to compensate defendants for the added expense caused
 21 them by plaintiffs' assertions of long-arm jurisdiction. Permitting awards
 22 in amounts exceeding the defendant's extra long-arm related expenses does
 nothing to further this policy. Thus, such excessive awards are not
 "reasonable" and should not be permitted under the statute.

Id. at 272. In a footnote, the court added that another purpose is "to deter plaintiffs from
 invoking long-arm jurisdiction as a means to harass foreign defendants." *Id.* at 272 n.6.

1 Here, there is no dispute that Bent Glass has “prevailed in the action” as required
2 by RCW 4.28.184(5). Rather, the parties dispute the amount of attorney’s fees that the
3 court may award to Bent Glass. Bent Glass asserts that it is entitled to full recovery of its
4 attorney’s fees because Bendheim’s lawsuit was frivolous or brought to harass. (Reply at
5 3-7.) The court finds that Bendheim’s lawsuit was neither frivolous nor brought to
6 harass; rather, Bendheim had colorable claims for relief and presented reasonable, if
7 ultimately unsuccessful, legal arguments in support of those claims. Accordingly, the
8 court declines to award Bent Glass its full attorney’s fees on the basis that the lawsuit was
9 frivolous or brought to harass.

10 Bent Glass also argues that it is entitled to all of its attorney’s fees due to the
11 added burdens of litigating in Washington. First, Bent Glass asserts that “[s]ince
12 Bendheim’s case was entirely baseless, the additional ‘burden’ on Bent Glass was the
13 entire cost of its defense.” (Reply at 7.) Second, Bent Glass contends that Mr. Lerner
14 was required to hire local Washington counsel rather than retain his cousin, Eric Lerner,
15 who would have charged a “substantially discounted rate” to represent Bent Glass in the
16 lawsuit had it been filed in Pennsylvania. (Lerner Decl. ¶ 4.) Finally, Mr. Lerner had to
17 travel to Washington twice: once to inspect the North Seattle Residence and once to
18 attend a mediation session among the parties. (Lerner Decl. ¶¶ 2, 5.)

19 An award of Bent Glass’s total attorney’s fees is not appropriate in this case.
20 First, because the court has already determined that Bendheim’s lawsuit was neither
21 frivolous nor brought to harass, it will not award Bent Glass its total attorney’s fees on
22 this ground. Second, Bent Glass would have incurred fees to defend against the merits of

1 the lawsuit regardless of where the lawsuit was filed; Eric Lerner could have provided
2 this defense by appearing *pro hac vice* and associating with Washington counsel. *See*
3 Local Rules W.D. Wash. GR 2(d). Finally, Mr. Lerner likely would have been required
4 to travel even if the lawsuit was filed in Pennsylvania: the inspection at the North Seattle
5 Residence would have taken place in Washington regardless of where the lawsuit was
6 filed; and, as the parties to this lawsuit are based in five different states, there is no
7 guarantee that the mediation would have taken place in Pennsylvania. Accordingly, the
8 court finds no ground on which to grant Bent Glass its total attorney's fees. Rather, the
9 court finds that Bent Glass is entitled only to those costs "necessary to compensate [it] for
10 the added litigative burdens resulting from the plaintiff's use of the long-arm statute."
11 *Fetzer*, 786 P.2d at 271. The court therefore grants Bent Glass's motion for those
12 additional attorney's fees it incurred as a result of defending the lawsuit in Washington,
13 but denies the motion to the extent it requests Bent Glass's total attorney's fees.

14 **III. CONCLUSION**

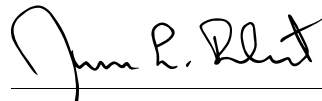
15 For the foregoing reasons, the court GRANTS in part and DENIES in part Bent
16 Glass's motion for summary judgment (Dkt. # 126). Bent Glass shall file an affidavit
17 setting forth its reasonable attorney's fees pursuant to RCW 4.28.184(5) and *Fetzer* by no
18 later than September 20, 2010. Bendheim may file a response to Bent Glass's affidavit
19 by no later than September 27, 2010.

20 //

21 //

22 //

1 Dated this 30th day of August, 2010.

2
3 
4 JAMES L. ROBART
5 United States District Judge
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22